

**AGRIMAL INDUSTRIES SDN. BHD.
(IN LIQUIDATION)**

v.

**UNITED MALAYAN BANKING CORPN.
BERHAD & ANOR.**

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J.
[ORIGINATING SUMMONS
NO. 25 - 27 - 1991]
22 MAY 1993

COMPANY LAW: Lien on fixed deposit - Not registered - Are creditors secured - Did winding up proceeding affect security - Right of set-off.

The applicant deposited a sum of RM290,000 as fixed deposit (FD) with the first respondent. The applicant executed a letter of set-off in favour of the first respondent for facilities granted to it. The applicant also applied for a bankers' guarantee to be issued to the second respondent and payable on demand. The guarantee was secured against the applicants' FD as a lien and also by way of a letter of set-off.

The second respondent issued a notice of demand for RM290,000 to the first respondent. On 9 October 1990 the first respondent forwarded payment of RM290,000 to the second respondent. On the same day the first respondent utilised the applicants' FD to combine and set-off against the sum of RM290,000 paid earlier to the second respondent and the applicant was notified of this action. The applicant claimed for refund of RM290,000.

Held:

[1] As the lien on the FD is a form of security as much as a charge is according to the definition of secured creditor, the first respondent was entitled to utilize it to pay to itself the payment of RM290,000 paid to the second respondent under the guarantee. Such security was not affected by the commencement of winding up proceedings or even the making of winding up order against the company. The contention that the FD is a charge and should be registered under s. 108 of the Act cannot be accepted as the FD is a lien and it is not registrable under s. 108(3) of the Act as lien is not so specified therein.

[2] On the facts and the law the first respondent has the right of set-off in this case.

[Application dismissed with costs].

a Cases referred to:

Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Oversea Credit Finance (M) Sdn. Bhd. & Ors. [1988] 2 MLJ at p. 458

Legislation referred to:

Bankruptcy Act 1967, s. 2, 41(1)
Civil Law Act 1956, s. 4(1)

b Companies Act 1965, ss. 108(1)(3), 223, 231, 233, 292(4), 293

Other sources referred to:

Halsbury's Laws of England, Vol. 3 & 7, 4th Edn., paras 792 & 1299, p. 741

English and International Set-off, Phillip R. Word, pp. 363 & 365, paragraphs 7-252, 7-256

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For the 1st respondent - Tan Hock Kim; M/s. Tan & Tan

For the 2nd respondent - Kulasegaran; M/s. Ranjit, Thomas & Kula

For the applicant - Jegathesan, Official Assignees Office

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JUDGMENT

Haidar bin Mohd. Noor J:

The Applicant, Agrimal Industries Sdn. Bhd. (In Liquidation) by way of originating motion applied for an order that -

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(a) The 1st respondent do refund/pay the sum of RM290,000 to the applicant and interest accrued on the sum of RM290,000 from date of deposit by the applicant's company until its release to the 2nd respondent or alternatively;

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(b) The 2nd respondent do pay the sum of RM290,000 to the applicant together with interest at the rate of 8% per annum from 9 October 1990 until payment;

(c) Costs to be paid by the 1st and 2nd respondents to the applicants.

(d) Further and other relief.

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Ng Pyak Yeow, the provisional Liquidator filed an affidavit in support of the originating motion (enclosure 2). The 1st respondent filed an affidavit on 21 October 1991 whereas the 2nd respondent filed an affidavit on 22 January 1992 opposing the originating motion.

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From the affidavit of Ng Pyak Yeow, the applicant is relying on ss. 223, 233 and 293 of the Companies Act, 1965 ("the Act") to say that the 1st respondent ought not to release the sum of RM290,000 to anyone except to the provisional Liquidator. The 1st respondent's Counsel submitted that the question of

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whether the 1st respondent has validly or wrongly paid out the RM290,000 rests on two issues, viz. -

- (1) Had the 1st respondent the right to set off the fixed deposit of RM290,000 against the RM290,000 paid by it to the 2nd respondent on the applicant's behalf under a pre-winding-up proceedings guarantee loan if it did not have a lien over the said fixed deposit?; or
- (2) had it the right to realise the security (that is fixed deposit) towards payment of the debt owed to it by the Applicant?.

The 2nd respondent's Counsel submitted that the 2nd respondent should not be made a party to this action as 1st respondent made the payment of RM290,000 to the 2nd respondent on the basis of a contract of guarantee which is a independent contract.

For convenience, I reproduce ss. 223, 233 and 293 of the Act:

Section 223:

Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

Section 233:

The relevant part of this section is subsection (1) which reads:

Where a winding up order has been made or a provisional liquidator has been appointed the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.

Section 293:

(1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall in the event of the company being wound up be void or voidable in like manner.

(2) For the purposes of this section the date which corresponds with the date of

presentation of the bankruptcy petition in the case of an individual shall be -

(a) in the case of winding up by the Court -

(i) the date of presentation of the petition; or

(ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date upon which the resolution to wind up the company voluntarily, is passed, whichever is the earlier; and

(b) in the case of a voluntary winding up the date upon which the winding-up is deemed by this Act to have commenced.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Agrimal Industries Sdn. Bhd. ("the Company") was ordered to be wound up on 5 February 1991 by the High Court, Johor Bahru upon the presentation of the petition of Perbadanan Kemajuan Ekonomi Islam Negeri Johor on 7 August 1990 *vide* Companies (Winding-Up) No. 28-50 of 1990. Ng Pyak Yeow was appointed as the Liquidator.

Earlier on, Perbadanan Kemajuan Negeri Islam Negeri Johor, the petitioner, by way of summons in chambers dated 15 August 1990 obtained an order from the High Court, Johor Bahru on 23 September 1990 for appointment of Ng Pyak Yeow as provisional Liquidator and the further order that the provisional Liquidator do take possession, control and protect the assets or realise the assets of the company and such assets are not to be distributed or parted with until further order. The provisional Liquidator advertised his appointment on 30 September 1990 purportedly under s. 231 of the Act in the New Straits Times.

I will now set out the facts leading to the payment of RM290,000 by the 1st respondent to the 2nd respondent.

The company has an account with the 1st respondent. Effective 30 September 1988 the company deposited a sum of RM290,000 as fixed deposit ('FD') with the 1st respondent (see exhibit 'BD 9'). The company executed a letter of set-off (First Party) on 2 October 1988 in favour of the 1st respondent for facilities granted to the Company (see exhibits 'BD 1, 2

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& 3'). Subsequently the Company applied to the 1st respondent for a banker's guarantee to be issued to the 2nd respondent and payable on demand. The 1st respondent wrote to the Company on 17 April 1989 setting out the conditions under which the 1st respondent would agree to issue a guarantee. (see exhibit 'BD4'). One of the terms is that the 1st respondent's guarantee is to be secured against the Company's FD as a lien and also by way of a letter of set-off. The acceptance by the company of the offer by the 1st respondent in respect of the guarantee to be given is shown by exhibits BD1 to 3, BD6, BD7, BD8 and BD9. On 28 November 1989 1st respondent issued a banker's guarantee to the 2nd respondent for RM290,000 payable on demand and valid from 30 December 1989 to 31 December 1990 (see exhibit 'BD 10').

On 24 January 1990 the 1st respondent issued a memorandum receipt to the company confirming the FD was security for the 1st respondent's guarantee (see exhibit 'BD 12').

On 21 September 1990 the 2nd respondent issued a notice of demand for RM290,000 by way of telex to the 1st respondent but was received by the 1st respondent only on 26 September 1990. (see exhibit 'BD 13').

The 1st respondent then notified the company by letter dated 26 September 1990 (see exhibit 'BD 14') in respect of the demand made by the 2nd respondent and stating that if no reply is received within ten days thereof the 1st respondent would pay as demanded by the 2nd respondent. As no reply was received from the company, the 1st respondent forwarded payment of RM290,000 to the 2nd respondent by letter dated 9 October 1990 (see exhibit 'BD 15').

On the same day, that is, 9 October 1990 the 1st respondent utilised the company's FD to combine and set-off against the sum of RM290,000 paid earlier to the 2nd respondent by the 1st respondent under the 1st respondent's guarantee and the company was notified of this action by letter on the same day itself (see exhibit 'BD 16'). By BD 16 the 1st respondent credited a sum of RM7,611.60 being interest accrued under the FD by way of a credit note.

On 27 October 1990 the 1st respondent received a letter from the provisional Liquidator

a dated 26 October 1990 (see exhibit 'BD17') that he had been so appointed by an order of the Court on 23 September 1990 (see exhibit 'BD18 - 19') Notice by the provisional Liquidator requiring payment of RM290,000 is exhibited as 'BD 20'.

b Mr. Ong Ban Chai, Counsel for the applicant submitted that the 1st respondent and 2nd respondent are not secured creditors as the FD was not duly registered in accordance with s. 108(1) of the Act as Mr. Ong contended that the FD was a charge. Failure to register the FD as a charge according to Mr. Ong would have the effect of making it void as against the Liquidator and any creditor of the company. (see *Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.* [1988] 2 MLJ at p. 458). He went on further to say that the sum of RM290,000 belonged to the Company and could not be set-off by the 1st respondent, relying on s. 292 of the Act especially s. 292(4). Mr. Ong further contended that the 1st respondent should come to the Court for an order before paying the 2nd respondent.

e On the other hand, according to Mr. Tan Hock Kim, Counsel for the 1st respondent, the real issues are whether on the facts and the law, the 1st respondent is entitled to a set-off and/alternatively to realise the security, that is, the lien on FD towards the payment of the debt owed to it by the company.

f I will consider on the issue of 'security' first. According to s. 4(1) of the Civil Law Act, 1956, bankruptcy rules under the law of bankruptcy shall apply to a winding-up of any company under any law from time to time in force relating to companies as to the respective rights of secured and unsecured creditors with respect to the estates of persons adjudged bankrupt. At p. 741 of **Halsbury's Laws of England**, Vol. 7, 4th Edn., it is stated that the definition of "secured creditor" in the Bankruptcy Act, 1914 (British Act) applies in the winding up of insolvent companies. Our Bankruptcy Act 1967 has been modelled along the British Bankruptcy Act 1914 and therefore the same rule should apply to the winding up of a company (see *Lian Keow Sdn. Bhd. supra* at p. 453). Under s. 2 of the Bankruptcy Act 1967 'secured creditor' means "a person holding a mortgage, charge or **lien** on the property of the debtor ... as a security

for a debt due to him from the debtor ...". Now, 'property' under the same section, "includes money ...". In my view, FD would come within the definition of 'property' under the Bankruptcy Act, 1967 as 'property' is not defined in the Act. The 1st respondent's letter of offer ('BD4') was accepted by the Company's acknowledgement thereof at BD5 and also duly resolved by the company (see 'BD7'). 'Security' in BD4 is stated:

The Bankers Guarantee is to be secured against **lien** on a fixed deposit receipt of RM290,000 or FDR No. 744072 f/g Agrimal Industries Sdn. Bhd. and extended to us by way of execution of a first-party letter of set-off.

Under the resolution of the Company ('BD7') accepting BD4, on 'Security', it was resolved "That the said banker's guarantee shall be secured by the pledging of the Company's bank fixed deposit of RM290,000 kept with the same bank". As the sum of RM290,000 by way of FD is to be a lien for the 1st respondent's guarantee to the 2nd respondent at the request of the company, the 1st respondent would then properly come within the meaning of 'secured creditor' and as such a receiving order (which is a winding up order in respect of companies) does not affect the right of a secured creditor to realise or deal with his security as in this case. (see para 792, Vol. 3 of **Halsbury's Laws of England**, 4th Edn.). A secured creditor need not prove at all but may rely on his security. He may pursue the remedies he possessed before the winding up. (see paragraph 1299 Vol. 7 of **Halsbury's Laws of England**, 4th Edn.).

In my view as the lien on the FD is a form of security as much as a charge is according to the definition of 'secured creditor', the 1st respondent was entitled to utilize it to pay to itself the payment of RM290,000 paid to the 2nd respondent under the guarantee. I agree that such security was not affected by the commencement of winding up proceedings or even the making of a winding up order against the company. The contention of Mr. Ong Ban Chai that the FD is a charge and should be registered under s. 108 of the Act cannot be accepted as the FD is a lien and it is not registrable under s. 108(3) of the Act as lien is not so specified therein. On this ground alone the applicant fails.

a In the alternative, the 1st respondent relied on the right to set off the payment of RM290,000 it made to 2nd respondent against the FD. Section 41 of the Bankruptcy Act 1967 provides for mutual credit and set-off and reads:

b 41(1) Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.

c (2) A person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him.

d On the facts, it is not disputed that the 1st respondent's guarantee was issued prior to the commencement of the winding-up proceedings and payment made to the 2nd respondent and reimbursement taken by the 1st respondent on FD were done after the commencement of the winding-up proceedings. In this respect Phillip R. Word in **English and International Set-off** at paragraph 7 - 252, p. 363 said under the caption "Insolvent reimbursement liability incurred pre-notice accrues after notice" -

e The liability of a principal debtor to reimburse a guarantor incurred under a pre-notice transaction should not be excluded from set-off under the third paragraph on the ground that it accrues post-notice by virtue of a post-notice calling of the guarantee. The principal debtor may incur the liability when he expressly agrees to indemnify the guarantor or when he impliedly agrees to indemnify the guarantor by requesting him to issue the guarantee. There is no voluntary build-up of a set-off by the guarantor under a post-notice transaction contrary to the objectives of the proviso. The reimbursement liability, though contingent, was incurred prior to notice.

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